SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

March 29, 2006

Edward C. Gibbs
Unit C
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. Gibbs, Def. ID# 0305016899

DATE SUBMITTED: December 22, 2006

Dear Mr. Gibbs:

Pending before the Court is a motion for postconviction relief which Edward C. Gibbs ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Also pending are related motions: one seeking my recusal, one for an evidentiary hearing, and one for appointment of counsel.

I address these latter motions first.

The first motion I address is the one seeking my recusal. The law which applies in deciding such a motion appears below.

A judge is required to be impartial in actuality and in appearance. Canon 3C of the Delaware Judges' Code of Judicial Conduct codifies this standard. Therein, it is provided in pertinent part:

> Disqualification. (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) The judge has a personal bias or prejudice concerning a party....

As explained in Los v. Los, 595 A.2d 381, 384-85 (Del. 1991):

> Where the basis for the alleged disqualification is a claim, under Cannon 3C(1), that the Judge "has a personal bias or prejudice concerning a party," no per se or automatic disqualification is required. Previous contact between the judge and a party, in the same or a different judicial proceeding, does not require automatic disqualification. [Citations omitted.] To be disqualified the alleged bias or prejudice of the judge "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." [Citation omitted.] ...
>
> When faced with a claim of personal bias or prejudice under Canon 3C(1) the judge is required to engage in a two-part analysis. First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality. [Citation omitted.]

The fact that adverse rulings were made against a defendant in the previous proceedings does not provide a reason for recusal. Weber v. State, 547 A.2d 948, 952 (Del. 1988), reargu. den., 571 A.2d 948 (Del. 1988); Brown v. State, 840 A.2d 641 (Del. 2003); Manchester v. State, Del. Supr., No. 351, 1997, Berger, J. (April 3, 1998); In the Matter of the Petition of Joseph A. Wittrock for a Writ of Prohibition, 649 A.2d 1053 (Del. 1994); Haskins v. State, Del. Supr., No. 188, 1991, Moore, J. (Aug. 19, 1991); State v. Fink, Del. Super., Def. ID# 0003008673, Vaughn, R.J. (July 19, 2002) at 2-3. Previously having sentenced a defendant is not enough to require recusal. Miller v. State, Del. Supr., No. 236, 1994, Hartnett, J. (May 9, 1995). Again, to repeat one of the holdings in Los v. Los, 595 A.2d at 384, the alleged bias or prejudice "`must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" Accord Jackson v. State, 684 A.2d 745, 753

(Del. 1996); State v. Fink, Del. Super., Def. ID# 0005008005, Vaughn, R.J. (June 14, 2002) at 5-6, aff'd, 817 A.2d 781 (Del. 2003).

The objectivity is viewed, not through the eyes of a defendant or his attorney, but from an objective observer's viewpoint. State v. Phillips, Del. Super., Def. ID# 0201017168, Ableman, J. (July 3, 2003) at 12-13. As explained in State v. Phillips, supra at 16-17:

> [T]here is a compelling policy reason for a judge not to disqualify herself at the behest of a party who claims an appearance of prejudice, without a factual or reasonable objective basis to do so. In the absence of genuine bias, a litigant should not be permitted to shop for a judge of his or her choosing. ... In short, the orderly administration of justice cannot be subject to a party's self-created, unsupported claims of prejudice or the appearance of bias.

A party must set forth facts showing impartiality or the claim fails. Bennett v. State, Del. Supr., No. 110, 1994, Holland, J. (December 19, 1994); Browne v. State, Del. Super., Def. ID# 93K00678, Ridgely, P.J. (May 11, 1993), aff'd, Del. Supr., No. 184, 1993, Moore, J. (Dec. 30, 1993).

In this case, defendant advances several reasons for why I should recuse myself.

The first basis asserted is that when defendant objected to the all white jury panel, I stated that the jury panel was selected in accordance with the statute. That I stated a fact is no basis for recusing myself, and this ground fails.

The second ground is there was a conspiracy to have me preside over the case rather than another judge. In support of that argument, defendant maintains Judge Graves and Judge Bradley previously had been assigned to hear the case.

Only in special circumstances, such as first degree murder cases, are judges in Sussex County assigned to a specific case. Contrary to defendant's contentions, no other judge ever was

assigned to handle his case. I did not actively seek to hear the case. My presiding over the trial in this matter was by happenstance. There was no conspiracy.

Defendant's next argument is best quoted:

> Movant filed a motion to dismiss counsel, on 12-19-03 Judge Stokes appointed counsel standby, Judge Stokes prejudice [sic] movant on direct appeal counsel didn't assist movant in researching the allegations for direct appeal; Judge Stokes denied movant counsel 12-19-03 the sentencing hearing: violation 6th Amend. 113 f3d 1026 Judge Stokes stated if you had cooperated with Mrs. Dunn you wouldn't be saying these things; that's bias and prejudice; Del. Judges code of Judical [sic] conduct, canon 3 ((a)-(e)

It is impossible to discern what defendant is arguing. It is defendant's duty to frame his arguments in such a way as to be intelligible. Because he has failed to do so, I do not address this argument.

Defendant's final argument is that he had listed me as a witness and then I had conferences with the attorneys which were not recorded.

I learned defendant put me on his witness list at the time of defendant's sentencing on December 19, 2003. Transcript of December 19, 2003 Proceedings at 10-11. I also learned, upon reviewing Ms. Dunn's affidavit submitted in connection with this matter, that Ms. Dunn refused to subpoena me. There was no basis for subpoenaing me. Defendant cannot attempt to create a conflict with a judge by putting his or her name on a witness list. Furthermore, there were no unrecorded conferences in this matter which dealt with anything other than administrative or scheduling matters.

Defendant's case, as will be seen below, was uncomplicated. I have dealt with defendant in the past; that, however, is not enough to establish bias or prejudice. I do not have any personal bias or prejudice towards him. I am satisfied that I can consider the pending motions free of bias

or prejudice.

Furthermore, there is absolutely nothing in the record or in defendant's motion which would provide any objective basis for concluding that the Court's consideration of this postconviction matter will inhibit the public's confidence and integrity in the judicial system. To restate, defendant has not set forth any facts or evidence which would establish a lack of impartiality.

In conclusion, I deny the motion to recuse.

I deny defendant's motions for appointment of counsel and for an evidentiary hearing because, as is clear from the discussion below, the Court summarily disposes of defendant's various Rule 61 claims.

Before I turn to the postconviction motion, I set forth the facts of the case.

First, defendant was charged with, and convicted of, committing the crime of escape after conviction as codified by 11 Del. C. § 1253 (2001). Therein, it was provided in pertinent part:

> A person shall be guilty of escape after conviction if such person, after entering a plea of guilty or having been convicted by the court, escapes from a detention facility or from the custody of ... the Department of Correction.
> Escape after conviction shall be a class D felony....

Second, during his bond hearing and at trial, defendant freely admitted that on May 25, 2003, he left his job while at Work Release and did not voluntarily return to the Work Release Center nor did he attempt to contact Work Release during the two and a half week period he was gone.

The Supreme Court's decision on defendant's appeal in Gibbs v. State, Del. Supr., No. 612, 2003, Berger, J. (Feb. 4, 2005), sets forth the facts thoroughly, and I quote therefrom below.

> (1) On March 11, 2003, Gibbs arrived at the Sussex Work Release Center

(SWRC) in Georgetown, Delaware, to begin serving the Level IV work release portion of a sentence imposed in November 2000 for violation of probation (VOP). n1 Upon arriving at the SWRC, Gibbs received a manual of the policies, rules and regulations of the corrections facility, including the work release program. During intake, an officer reviewed with Gibbs certain program requirements, including the specific policy that a resident who failed to remain within one hour contact of the SWRC could be placed on escape status.

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n1 State v. Gibbs, Del. Super., Cr. ID No. 87S00031DI, Stokes, J. (Nov. 20, 2000). The sentence was modified on October 24, 2001, to address a good time problem and on February 24, 2003, to change Level IV "home confinement" to Level IV "work release."

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(2) After a week-long orientation period, Gibbs obtained employment at a chicken house in Laurel, Delaware. Gibbs then obtained employment at the Sussex Pines Country Club in Georgetown.

(3) On May 25, 2003, Gibbs did not return to the SWRC from his job at the Sussex Pines Country Club. As a result, a warrant issued the following day for Gibbs' arrest. Gibbs was apprehended without incident on June 11, 2003, in Georgetown.

(4) On June 12, 2003, as a result of his arrest, Gibbs was charged with VOP. A VOP hearing was scheduled and later continued. On July 18, 2003, Gibbs was charged with Escape after Conviction. A jury trial was held on October 30, 2003, on the escape charge.

(5) At the outset of his trial, Gibbs, through counsel, filed a motion to dismiss. After the State rested, Gibbs moved for judgment of acquittal. In the interim, Gibbs requested a jury instruction on the lesser-included offense of Escape in the Second Degree. The Superior Court denied all of the applications.

(6) At trial, Gibbs testified that he made no effort to contact the SWRC between May 25, 2003, when he failed to return to the facility, n2 and June 11, 2003, when he was finally apprehended in Georgetown. The jury found him guilty as charged of Escape after Conviction.

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n2 Gibbs testified that when he got off of work on May 25, 2003, he went to see his son, "was with [a] female," "was drinking . . . and just fell asleep." Trial Tr. at 91 (Oct. 30, 2003).

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(7) At the December 12, 2003 sentencing proceeding, Gibbs moved to dismiss his trial counsel on the basis of alleged incompetence. The Superior Court denied the motion. Nonetheless, after a lengthy colloquy, the Superior Court permitted Gibbs to proceed pro se for the remainder of the proceedings and directed his trial counsel to serve as standby counsel.

(8) Prior to imposing the sentence, the Superior Court considered and denied a motion for new trial that had been filed by Gibbs' counsel. The Superior Court then granted the State's motion to have Gibbs declared an habitual offender. Finally, the Court took up the matter of the VOP charge and, after hearing from Gibbs, adjudged him guilty of VOP.

(9) For Escape after Conviction, the Superior Court sentenced Gibbs, as an habitual offender, n3 to twenty years incarceration at Level V with credit for time served, followed by six months at Level IV work release. On the VOP, the Superior Court sentenced Gibbs to one year and nine months at Level V, suspended for two years at Level III probation. This pro se direct appeal followed.

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n3 Del. Code Ann. tit. 11, § 4214(a).
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(10) Earlier in this appeal, Gibbs moved for the appointment of substitute counsel. By Order dated July 8, 2004, the Court denied the motion, ruling that Gibbs' dissatisfaction with his former trial counsel did not, in and of itself, provide a basis for the appointment of substitute counsel on appeal. n4 Thereafter, by Order dated August 11, 2004, the Court denied Gibbs' motion for rehearing en banc of the July 8 Order. Gibbs now attempts in his opening brief to further challenge the denial of substitute counsel; however, that decision is not subject to further review in this Court.

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n4 Gibbs v. State, 2004 Del. LEXIS 303, 2004 WL 1587043 (Del. Supr.).
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(11) In his opening brief, Gibbs, who is African American, alleges that his trial by an all-white jury suggests that there was a systematic exclusion of minorities from the jury selection process. He raised a similar claim in his unsuccessful motion for new trial. The claim is without merit. Gibbs has not made a prima facie showing that the jury's composition resulted from the systematic exclusion of minority members for racially motivated purposes. n5

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n5 Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986); Riley v. State, 496 A.2d 997, 1009 (Del. 1985).

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(12) Next, Gibbs contends that he was entitled to a jury instruction on the lesser-included offense of Escape in the Third Degree. He also contends that the Superior Court erred when instructing the jury on Escape after Conviction. Both claims will be reviewed only for plain error, n6 as neither claim was raised at trial. n7

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n6 Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986).

n7 Gibbs did not request a jury instruction on the lesser-included offense of Escape in the Third Degree. He requested, and was denied, a jury instruction on the lesser-included offense of Escape in the Second Degree.

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(13) The Superior Court did not commit plain error by not instructing the jury on the lesser-included offense of Escape in the Third Degree. There was no rational basis in the evidence for a verdict acquitting Gibbs of Escape after Conviction but convicting him of Escape in the Third Degree. n8 Escape in the Third Degree does not require proof, as does Escape after Conviction, of having escaped from a detention facility after having been convicted of a crime. n9

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n8 Del. Code Ann. tit. 11, § 206(c); Herring v. State, 805 A.2d 872 (Del. 2002).

n9 See Del. Code Ann. tit 11, § 1253 (2001) (providing that a person is guilty of escape after conviction if the person, after entering a plea of guilty or having been convicted by the court, escapes from a detention facility or from the custody of the Department of Health and Social Services or the Department of Correction) (amended 2003); see Del. Code Ann. tit 11, § 1251 (providing that a person is guilty of escape in the third degree when the person escapes from custody, including placement of nonsecure facilities by the Division of Youth Rehabilitative Services); Flamer v. State, 794 A.2d 1160, 2002 WL 549544 (Del. Supr.).

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(14) Moreover, Gibbs has not demonstrated any error, much less plain error, with respect to the Superior Court's jury instruction on the offense of Escape after

Conviction. Contrary to Gibbs' claim, the crime of Escape after Conviction includes an element of "knowledge" of the offense. n10

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n10 Del. Code Ann. tit. 11, § 1258 (4) (defining "escape" as "departure from the place in which the actor is held or detained with knowledge that such departure is unpermitted").
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(15) Gibbs argues that there was insufficient evidence to prove beyond a reasonable doubt that he was in the custody of the Department of Correction on May 25, 2003, when he was alleged to have escaped. Gibbs' claim is without merit. As a matter of law, an inmate on pass from a work release facility continues to be in the custody of the Department of Correction and is subject to the penalty for escape. n11

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n11 Del. Code Ann. tit., 11 § 6533(b); Woodlin v. State, 782 A.2d 267, 2001 WL 1006216 (Del. Supr.); Smith v. State, 361 A.2d 237 (1976); Gaskill v. State, 51 Del. 107, 138 A.2d 500, 1 Storey 107 (1958).
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(16) In a related claim, Gibbs argues, as he did in the Superior Court, that because he was serving a sentence imposed on a VOP when he failed to return to the SWRC, he was not subject to a charge of Escape after Conviction. Gibbs' claim is without merit. Gibbs was criminally convicted and was serving the Level IV work release portion of a VOP sentence when he failed to return to the SWRC. Gibbs was properly charged with Escape after Conviction.

(17) Gibbs claims that his twenty-year sentence for Escape after Conviction is grossly disproportionate and in violation of the Eighth Amendment. His claim is without merit. As an habitual offender, Gibbs was facing a statutory minimum of eight years to a maximum of life imprisonment for the Class D felony conviction of Escape after Conviction, which is classified as a violent felony. n12 In view of Gibbs' extensive criminal history, which the Superior Court reviewed in detail at sentencing, the twenty-year sentence does not give rise to an inference of disproportionality. n13

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n12 Del. Code Ann. tit. 11, § 4201(c).

n13 See McCleaf v. State, 2004 WL 344423 (Del. Supr.) (holding that habitual offender sentence imposed was not disproportionate and did not implicate Eighth

Amendment).
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(18) Gibbs contends that he was not afforded due process, specifically adequate notice, with respect to the VOP charge that the Superior Court considered immediately prior to his sentencing. n14 His contention is without merit. The record reflects that Gibbs was brought before the Superior Court on June 12, 2003, pursuant to an administrative warrant, and that a VOP hearing was scheduled for June 27, 2003. By letter dated July 1, 2003, addressed to Gibbs, the Superior Court confirmed that the June 27 VOP hearing had been continued and would be rescheduled after disposition of the Escape after Conviction charge.

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n14 Super. Ct. Crim. R. 32.1. "[Due process] requires that a probationer receive notice of the alleged violations of probation, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses, and an independent decision maker." Gibbs v. State, 760 A.2d 541, 543 (Del. 2000) (citing Gagnon v. Scarpelli, 411 U.S. 778, 786, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973))
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The Supreme Court affirmed the judgments of the Superior Court.

Before addressing the Rule 61 claims, I take note of claims defendant advances which Rule 61 does not authorize. In grounds twenty-seven and twenty-eight, defendant sets forth two arguments contending that the Supreme Court erred. This Court does not have jurisdiction to consider such claims and accordingly, the Court ignores them.

I now turn to the Rule 61 claims. The first step this Court takes is to determine if the claims defendant advances in this Rule 61 motion may proceed or if they are procedurally barred. In the version of Rule 61(i) which applies to defendant's case, it is provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of

justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

Defendant's motion is timely filed. Rule 61(i)(1).

Defendant has advanced a number of claims which are procedurally barred because they previously have been decided or defendant had the opportunity to raise them on appeal but failed to do so and defendant failed to make any attempt to establish that any exception to the procedural bars exists. Thus, the following claims are denied as they are procedurally barred:

Ground fifteen: Judge Bradley abused his discretion

Ground sixteen: Judge Stokes abused his discretion

Ground seventeen: movant denied right to testify

Ground eighteen: movant was tried by all white jury

Ground nineteen: Judge Stokes committed plain error

Ground twenty: Judge Stokes committed plain error

Ground twenty-one: Judge Stokes committed plain error

Ground twenty-two: Judge Stokes was not fair or impartial

Ground twenty-three: Judge Stokes should have recused himself

Ground twenty-four: The transcripts are missing information

Ground twenty-five: movant sentenced as habitual offender

Ground twenty- six: movant denied probation violation hearing

Ground twenty-nine: Superior Court errored [sic]

Ground thirty: Superior Court errored [sic]

Ground thirty-two: prosecutorial misconduct

Defendant also advances numerous instances of ineffective assistance of counsel. Since this is the first time defendant could advance these claims, they are not procedurally barred.[1]

To establish a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness and but for the attorney's unprofessional errors, the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). With regard to the actual prejudice aspect, "[d]efendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694. In advancing a claim for ineffective assistance of counsel, a defendant must set forth specific, concrete allegations; vague, conclusory allegations fail. Younger v. State, 580 A.2d 552, 555 (Del. 1990).

Trial counsel was Carole J. Dunn, Esquire. She has submitted an affidavit in response to the allegations. This affidavit thoroughly addresses each of defendant's argument, which I

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[1]Defendant actually has advanced many of these claims previously both before the Supreme Court, Gibbs v. State, supra at 8-9, and the Superior Court, Transcript of December 19, 2003 Proceedings. Neither court ruled on the claims; thus, they are not procedurally barred.

examine below.

1) Defendant was coerced into waiving his preliminary hearing

Defendant claims a public defender told him he would get a plea deal of thirty days, as allegedly reflected by a written statement on the paperwork. The statement on the waiver is: "Can't we dispose of this case with an Escape 3rd and 30 days 4204k? That is standard." Docket Entry No. 3. Thus, the written statement on the paperwork actually shows that a sentence of thirty days was not offered and his attorney was requesting that such a plea be offered.

Defendant has failed so show how he was coerced into waiving his preliminary hearing. In any case, even if the process was defective, "a defect in the preliminary hearing process, including a defective waiver, has no bearing on a defendant's subsequent conviction." State v. Bailey, Del. Super., Def. ID# 0009007758, Silverman, J. (Dec. 13, 2004) at 5, app. dism., Del. Supr., No. 8, 2005, Ridgely, J. (April 11, 2005). Consequently, even if trial counsel was ineffective, defendant has failed to show prejudice. This claim fails.

2) Trial counsel was ineffective for failing to challenge the "defective" information

Defendant argues trial counsel was ineffective for failing to challenge the defective information. He does not specify how the information was defective. The Court does not guess at his argument. This claim fails for vagueness. Younger v. State, 580 A.2d at 555.

3) Counsel failed to appear for arraignment

Defendant argues that trial counsel was not present for arraignment. The Court's judicial action form of the arraignment shows that Mr. Hyde of the Public Defender's Office was present with defendant at the videophone arraignment which took place on August 7, 2003. Docket Entry No. 4. This claim is factually meritless and is denied.

4) Trial counsel was ineffective for failing to visit defendant at prison from June to October, 2003

Trial counsel dealt with defendant over the videophone on July 24, 2003, and in person at case review on September 2, 2003. She also corresponded with him on a regular basis during that time frame. There was no ineffectiveness established merely from her failure to go to the prison to see him. Even if there was, defendant has failed to show how he was prejudiced from her failure to visit him at prison during this time. This claim fails.

5) Trial counsel failed to subpoena the witnesses he listed

Defendant has failed to identify what witnesses he wanted subpoenaed. Thus, this claim fails due to vagueness. Younger v. State, supra. In any case, defendant has failed to establish how the failure to subpoena witnesses he wanted subpoenaed constituted prejudice. This claim fails.

6) Trial Counsel admitted she had a conflict with defendant

Defendant misrepresents that trial counsel admitted she had a conflict with defendant. Instead, a review of the transcript of the proceedings of the October 22, 2003, case review show that trial counsel explained to the Court that she and defendant had different views of the law regarding escape after conviction, but that difference did not affect her representation of him. Exhibit 17 to Ms. Dunn's affidavit. Basically, defendant's conflict with trial counsel and everyone else is that he refuses to accept the law for what it is regarding escape after conviction. The law and facts are what they are. The fact defendant maintains they are something else does not create conflict with trial counsel. This claim fails.

7) Trial counsel failed to present a meaningful defense at trial and

8) Trial counsel's performance fell below an objective standard of reasonableness

These arguments are vague and conclusory and fail for those reasons. Younger v. State,

supra.

In any case, I have reviewed the record in this case, including all the transcripts, Ms. Dunn's affidavit, and defendant's filings on the pending motion. I repeat here what I stated to defendant at the time of his sentencing. This case was a simple case from the State's point of view. At the time of his bond hearing, defendant stated that he "didn't escape from no jail:, that he was in "work release" and that when he went to work, he "just didn't return." Exhibit 19 to Ms. Dunn's affidavit. This case is what commonly is labeled "an open and shut case". Despite that, trial counsel worked very hard on defendant's behalf. She presented defendant with a meaningful defense. She called witnesses and advanced arguments. She made objections. She effectively represented defendant. These claims fail.

9) Trial counsel discussed movant's defense with the prosecutor and the Court

Trial counsel's affidavit clarifies that she did not disclose any confidential or privileged information. Furthermore, defendant has failed to establish any prejudice to his case with regard to any discussion trial counsel had with the prosecutor. This claim fails.

10) Trial counsel was ineffective for failing to object to the prosecutor's misconduct during trial

Defendant argues it was prosecutorial misconduct for the prosecutor to object to certain testimony to which defendant would testify. Defendant has failed to establish any prosecutorial misconduct. There was nothing to which trial counsel should have objected. This claim fails.

11) Trial counsel was ineffective for advising him not to testify

Defendant actually testified, albeit, against the advice of counsel. His testimony established that he was at the Work Release Center; he went to work; on May 25, 2003, he went to see his son after work; he was with a female; he was drinking and he just fell asleep; and he

did not make any effort to return to the Work Release Center between May 25, 2003 and June 11, 2003, when he was picked up. The fact Ms. Dunn did not want him to testify was effective representation. In any case, her desires became moot when he testified. Her desires did not cause him any prejudice. This claim fails.

12) Trial counsel was ineffective for not telling him about meetings in chambers and not including him in those meetings

An incarcerated defendant never is allowed into Chambers. Defendant could not appear at any such meetings. Furthermore, trial counsel informed him of what occurred at those meetings. Even if trial counsel was ineffective, defendant has failed to show any prejudice. This claim fails.

13) Trial counsel was ineffective for failing to object to statements that knowledge was a part of the escape charge

As the Supreme Court ruled, knowledge is an element of the case. Gibbs v. State, supra at 6. Trial counsel was not ineffective. This claim fails.

14) Trial counsel failed to assist him on appeal

Due to defendant's own choosing, trial counsel was made to be standby counsel since defendant was adamant he could represent himself. Trial counsel's letters attached to her affidavit establish she provided aid to defendant. In any case, defendant has failed to specify what research she failed to provide him and how the outcome of the appeal would have been different if she had supplied that research. This claim fails for vagueness. Younger v. State, supra.

For the foregoing reasons, defendant's claims of ineffective assistance of counsel fail.

Defendant's final argument is that the Superior Court lacked jurisdiction over the case because there was no presentment to the Grand Jury. I will consider this claim because it fits

within the exception to the procedural bars. Super. Ct. Crim. R. 61(i)(5). A prosecution may proceed by information if a defendant waives proceeding by indictment. Super. Ct. Crim. R. 7. In this case, he so waived. Docket Entry 3. This claim is meritless.

For the forgoing reasons, the Court denies each of the pending motions defendant has filed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Carole J. Dunn, Esquire
Paula Ryan, Esquire